Supreme Court, U.S.
FILED

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No.
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1996

IVANI CONTRACTING CORP.,

Respondent,

-against-

THE CITY OF NEW YORK, et al.,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 4, 1997

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31 pp

QUESTION PRESENTED

May laches be interposed as a successful defense to an action for an alleged civil rights violation before the expiration of the statute of limitations where the plaintiff, the lowest bidder for two City contracts, was apprised long before the award of the contracts and long before the order to commence work was issued on either contract, that it would not be awarded the job, and plaintiff did not seek either by way of state remedy or injunctive relief in federal court an order awarding it the contract or staying the award and construction of the projects involved, but, instead, without explanation, waited until the City had paid out over $3,000,000 for both projects which had been completed, before it brought its civil rights lawsuit seeking as damages the loss of profits for contracts for which it had no vested rights, under state law, thereby raising the possibility that municipal funds would have to pay twice for the projects?

PARTIES TO THE PROCEEDING

The parties in this case when it commenced were as follows:

1. Ivani Contracting Corporation, plaintiff.

2. The City of New York, defendant.

3. David N. Dinkins, in his official capacity as Mayor of the City of New York, defendant.

3. Michael C. Rogers, in his official capacity as Chief Procurement Officer of the City of New York, defendant.

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JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on January 7, 1997. The jurisdiction of this Court is invoked under the provision 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

STATUTORY PROVISIONS

42 United States Code § 1983

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom of usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

General Municipal Law § 50-e

50-e. Notice of claim

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the

commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

General Municipal Law § 103(1)

103. Advertising for bids; letting of contracts; criminal conspiracies

1. Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section. In any case where a responsible bidder's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the low bid. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may

award the contract to any of such bidders. Such officer, board or agency may, in his or its discretion, reject all bids and readvertise for new bids in the manner provided by this section.

New York City Charter § 313(b)(2)

(b) 2. The agency letting the contract may reject all bids if it shall deem it for the interest of the city so to do; it shall, without other consent or approval, award the contract to the lowest responsible bidder, unless the mayor shall determine in writing, justifying the reasons therefor, that it is in the best interest of the city that a bid other than that of the lowest bidder shall be accepted. Such determination shall be filed with the procurement policy board and published in the City Record. Tie bids shall be decided by the agency letting the contract and the award made. Whenever a contract is awarded to other than the lowest bidder because the lowest bidder is determined by the agency not to be a responsible bidder or because the lowest bid is determined by the agency not to meet the requirements and criteria as set forth in the invitation for bids, the agency making such determination and awarding such contract shall immediately notify the lowest bidder of such determination and shall file in the agency contract file a statement in detail of the reasons therefor and shall submit copies of such determination to the procurement policy board.

New York City Charter § 1304(a)

§ 1304. **Division of Economic and Financial Opportunity.** There shall be a division of economic and financial opportunity within the department.

a. The purpose of the division shall be to enhance the ability of minority and women owned business enterprises to compete for city contracts, to enhance city agencies' awareness of such business enterprises, and to ensure their meaningful participation in the city procurement process.

11 Rules of the City of New York § 3-09(a)

§ 3-09 MBE/MBE Price Preferences

(a) In the case of contracts for goods, services or construction to be let by competitive sealed bidding, the agency may state in the invitation to bid that if the lowest responsible bid is submitted by a person who is not a certified firm and there is another bid within the "target percentage" of bid offered by the lowest responsible bidder from either a person that is so certified or a qualified joint venture, as defined in section 3-02 of these rules, the agency shall refer such bid and the lowest responsible bid to the Major, or such other official as may exercise such power pursuant to section 310 of the New York City Charter, for a determination pursuant to subdivision b of section 313 of such charter of whether it is in the best interest of the City that the contract shall be awarded to other than the lowest responsible bidder. The "target percentage" shall be 10% unless the contracting agency

determines, and states in the invitation for bids, for reasons which shall be documented in the contract file, that a different percentage is appropriate for the particular contract.

(b) Except as directed by the Mayor, or such other official as may exercise the power described in section 313 of the Charter, the technique described in this section shall not be utilized for contracts for goods, services or construction in excess of five million dollars.

(c) Nothing in these rules shall be deemed to restrict or diminish the powers conferred on any official pursuant to section 313 of the Charter.

STATEMENT OF THE CASE

(1)

Plaintiff, a construction company owned by men of Italian descent, sued the City of New York, David N. Dinkins, as mayor of the City, and Michael C. Rogers, as the City's Chief Procurement Officer, in Federal District Court alleging a federal cause of action pursuant to § 1983 and a state cause of action under § 103 of the General Municipal Law of New York, which establishes conditions for competitive bidding of public contracts. Plaintiff alleged that the defendants had discriminated against it on the basis of race and/or gender by awarding contracts for which it had submitted the lowest bids to contractors owned by minorities and/or women. Plaintiff seeks damages in the amount of $1,075,000 for lost profits at not having been awarded the contracts and $10,000,000 in punitive damages,

legal fees, costs and interest.

The United States District Court for the Eastern District of New York dismissed the complaint against the City of New York (hereafter referred to as "the City") on the ground of laches. The District Court also dismissed plaintiff's claim for punitive damages as unsupported by the record.

The United States Court of Appeals for the Second Circuit reversed and held that laches is not available to bar plaintiff's legal claim for damages under § 1983. Having reinstated plaintiff's federal claims, the Circuit Court also reinstated plaintiff's state claims. However, the Circuit Court affirmed that portion of the District Court's order dismissing the claims for punitive damages.

(2)

Section 1304(a) of the New York City Charter directed the City of New York to "enhance the ability of minority and women-owned business enterprises to compete for City contracts, " . . . and "to ensure the meaningful participation in the City procurement process." Pursuant section 1304(c), the New York City Department of Business Services ("DBS") promulgated such rules, codified at Title 11 of the Rules of the City of New York ("RCNY") §§ 3-01 through 3-28, which took effect August 1, 1992, necessary to implement the purposes of this chapter.

These rules allowed the City agencies to give a preference in contract bidding to certified minority- or women-owned business enterprises (certified firms). 11 RCNY § 3-09(a) (repealed on September 1, 1994) provided

that an agency could state in the invitation to bid that if "the lowest responsible bid" is made by a person not a certified firm and another bid within the "target percentage" often percent of the lowest bid is from a certified firm, the agency shall refer that bid and the lowest responsible bid to the Mayor, or another official exercising power under § 313 of the City Charter, to determine whether in the "best interest" of the City the contract should be awarded to a certified firm.

The bid solicitation materials issued in connection with these contracts included the language that notified bidders that contracts were subject to being awarded following the procedures set forth in Section 313(b) of the City Charter and 11 RCNY § 3-09.

In November 1992, the City issued invitations to bid on two contracts to construct storm-sanitary sewers in Queens County, informing bidders that the contracts would be awarded subject to the above Rules.

Plaintiff submitted a bid of $195,836 on the first sewer contract. Although the bid was the lowest, the City awarded the contract to the third lowest bidder ($202,273), a joint venture that had sufficient minority and/or female ownership to qualify for the City's bidding preference.

On December 22, 1992, defendant Rogers wrote to the plaintiff that the contract would be awarded to a certified firm. On July 6, 1993, the contract was awarded, and on January 24, 1994, the City issued an Order to Commence Work.

On December 21, 1992, plaintiff submitted a bid of

$2,925,830 on another contract. Plaintiff's bid, initially the second lowest, became the lowest when the lower bid was withdrawn in April 1993. On April 22, 1993, defendant Rogers wrote plaintiff that the second contract would be awarded in accordance with the Rules to a certified joint venture which had submitted the sixth lowest bid of $3,094,444. The contract was officially awarded on July 16, 1993 and the City issued an Order to Commence Work on November 17, 1993.

Plaintiff served the City with a notice of claim on July 19, 1993.[1] On July 19, 1994, plaintiff sued the City in the United States District Court for the Eastern District of New York. Plaintiff sought $1,075,000 in lost profits and $10,000,000 in punitive damages.

By the time plaintiff had filed its action, work on both contracts was significantly, if not completely, finished. On the first contract, the City had paid out $152,777.61, more than seventy-five percent of the contract price. The second contract had been completed, and the City had paid out $2,982,150.58, ninety-five percent of the contract price.

The City moved for summary judgment pursuant to Fed R.. Civ. P. 56(c), asserting that plaintiff's laches barred its claim.

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[1] Section 50-e of the New York General Municipal Law provides that the filing of a notice of claim against a municipality is a condition precedent to the commencement of an action based on state law. N.Y. Gen Mun. Law § 50-e. See, Davidson v. Bronx Mun. Hosp., 64 N.Y. 2d 59, 61-62, 484 N.Y.S.2d 533 (1984). Filing a notice of claim does not obligate a party to commence a lawsuit.

DECISIONS BELOW

(1)

The District Court noted that laches is not simply another species of statute of limitations. In contrast to the statute of limitations, which fixes a definite time beyond which an action is barred, laches is an equitable defense applicable when a plaintiff unreasonably delayed bringing suit and the defendant has been prejudiced by the delay (A32).[2] While it recognized that some courts have said that the laches may not apply at an action at law but only in equity, the District Court found it was hard to see why his principle should be so, particularly in light of the merger of law and equity. Fed. R. Civ. P. 2.

The District Court found that when plaintiff learned that it would not receive the contracts and why, it had a variety of options. It could have sought an injunction in Federal Court or could have mounted a challenge in state court within four months in an Article 78.[3] In such a proceeding, plaintiff could have raised the constitutionality of the City's Rules (A37-39). Finding that on the first contract, more than a year passed after plaintiff learned it would not be awarded the contract and the order to

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[2] Numbers preceded by the letter "A" in parentheses refer to the page number of the Appendix to the Petition for a Writ of Certiorari.

[3] Article 78 of New York State's Civil Practice Law and Rules (CPLR) governs the bringing of the traditional common law writs of prohibition, mandamus and certiorari to review.

commence work, and in the second contract, almost seven months passed after plaintiff learned it would not be awarded the contract and the order to commence work, the District Court ruled that plaintiff's failure to file his civil rights lawsuit for lost profit damages after work on both contracts was either complete or nearly complete was unreasonable (A38-39). Plaintiff presented no evidence to excuse or explain its behavior (A39).

The prejudice to the City was manifest, stated the District Court. The City had paid out more than three million dollars, an amount it had no hope of getting back (A39). The District Court held that plaintiff's laches barred his § 1983 claims (A38-40).

(2)

The Court of Appeals reinstated plaintiff's state claims after holding that it would not allow laches to bar plaintiff's claim which was otherwise timely filed under § 1983's three-year statute of limitations period, borrowed from analogous state law (A14-15). Although it recognized that its ruling interfered with the state's prerogatives in awarding its public contracts and the public may have to "pay twice" if the court awarded damages, the Circuit Court claimed that the City acted at its own peril if it distributed its funds in a potentially unconstitutional manner (A20).

REASONS FOR GRANTING THE WRIT

A public contractor whose low bid is wrongfully rejected by a government entity and awarded to a higher bidder has standing to prosecute an action for injunction or mandamus. However, this standing under New York State law does not expand his inchoate bid solicitation into the vested right to the award of a public contract, the deprivation of which by an awarding authority is actionable in damages. The reasoning behind this view is that while giving standing to the individual bidder to maintain an equitable action may be desirable in furtherance of the bidding laws' purpose to protect public interests from arbitrary or wrongful government conduct, the enforcement powers granted should not elevate the bidder to a position he would not otherwise enjoy, and that permitting an action for damages in deprivation of any vested interests would not only be contrary to the public interest the bidding laws were designed to protect, but also usurp the role of government in the competitive bidding process.

In the case at bar, with regard to both public contracts at issue, appellant was notified, before the award of each contract, that each contract would not be awarded to the lowest bidder, but to a minority or women-owned business enterprise or qualified joint venture because the Mayor had determined that it was in the best interests of the City and pursuant to law. Although plaintiff had more than ample time to seek an injunction in Federal Court or mandamus to compel the City to comply with proper contract award procedures so that it could perform the contracts for which it was the lowest bidder, plaintiff, without explanation, chose to wait until long after much of

the work on both contracts had been completed and substantial payments made to the contractors before filing its civil rights lawsuit in Federal District Court. Plaintiff calculated his damages based on the lost profits he allegedly would have made if he had been awarded the contracts.

The defendants moved for summary judgment on the grounds that plaintiff's laches in bringing his claims barred his lawsuit. The Circuit Court ruled that laches may not be interposed as a defense to a civil rights action for damages that plaintiff reached by calculating its lost profits on the contracts.

By its determination, the United States Court of Appeals sanctioned plaintiff's delay and forever placed any municipality on the horns of a dilemma. Although plaintiff filed a notice of claim, it is clear from its subsequent lack of action that it had no intention of seeking through litigation the opportunity to perform the disputed contracts. Thus a municipality when confronted with such circumstances must decide if government needs should not be met until litigation is brought and the matter resolved (which may engender further litigation by the successful bidder); or should it rebid the contract in the hope that other litigation will not be forthcoming; or should it allow the contracts to be performed notwithstanding the possibility of outstanding litigation leading to double payment and waste of public funds. Although plaintiff offered no excuse for his delay in bring his civil rights claim, the public defendant may have to pay twice for the same construction projects as a result of plaintiff's delay.

The Circuit Court was unmoved by the facts that while plaintiff sought lost profits in its civil rights action for

contracts for which he had no vested rights, he made no attempt to secure the award of those contracts with remedies it had in both in state court and in federal court. By allowing plaintiff to pursue its civil rights suit on its relaxed time schedule, the Second Circuit sanctions the defeat of the purpose of public bidding laws and allows for damages for rights that were not vested.

The Court of Appeals for the Second Circuit reached this anomalous result by its rigid adherence to antiquated distinctions between law and equity. This view defies the purpose of the merger of law and equity found in the Federal Rules of Civil Procedure which grants the federal courts the power to fashion any remedy justified by the pleadings and proof. Moreover, the Circuit Court's decision marks a divergence from the holdings of other Circuit Courts and District Courts which sanction the use of laches as a defense in an action at law in order to allow the courts to fashion a just result that balances and accommodates the intersecting interests of the remedial purpose of the civil rights laws, state sovereignty and the availability of state and federal remedies by which a party may secure the rights that may otherwise be pursued by bringing suit pursuant the federal civil rights laws.

(1)

While an unsuccessful bidder in New York State has standing to maintain a proceeding to review the award of a contract in violation of a statute requiring that the contract go to the lowest bidder, this procedure was sanctioned only to ensure enforcement of the General Municipal Law § 103 which prescribes when and the manner in which a municipality shall request bids and award contracts. Stride

Contracting Corp. v. Board of Contract & Supply of the City of Yonkers, 181 A.D.2d 86, 581 N.Y.S.2d 446 (2nd Dept. 1992). The disappointed bidder has no cause of action for breach of contract. See e.g., Malloy v. City of New Rochelle, 198 N.Y. 402, 408-409, 92 N.E. 94 (1910). No prospective contractor, not even the low bidder, has a property interest in any contract. Eastway Construction Corp. v. City of New York, 762 F. 2d 243, 250 (2d Cir. 1985); Conduit & Foundation Corp. v. Metropolitan Authority, 66 N.Y. 2d 144, 148, 495 N.Y.S.2d 340 (1985). See also, 65 ALR4th 93, Public Contract Bids: Damages.

The reason behind this rule is two-fold: First, statutes that call for awards to go to the lowest responsible bidder are enacted for the benefit of the public, not rejected bidders. Seneca Mineral Co., Inc. v. County of Chautagua, 797 F. Supp 237, 239 (W.D.N.Y. 1992); Construction Contractors Association v. Board of Trustees, 192 A.D.2d 265, 267, 268 (2d Dept. 1993); Allen v. Eberling, 24 AD2d 594 (2d Dept. 1965). Disobedience of such provisions by a public officer may not be used by a disappointed bidder as a double source of punishment to the public body. If the low bidder were permitted to maintain such an action, then this disobedience to the statute would make the body public pay the difference between the lowest bid and the bid for which the contract was made, and also the profit that the lowest responsible bidder would have made if the statute had not been violated. 64 Am Jur 2d, Public Works and Contracts § 86, pp. 947-48. Second, an unaccepted bid is not a contract and can sustain no cause of action for its breach. Seneca Mineral Co., Inc. v. County of Chautagua, supra, 797 F. Supp at 239, citing, Carroll-Ratner Corp. v. City Manager of New Rochelle, 54 Misc.2d 625, 283 N.Y.S.2d 218 (Sup Ct Weschester Co.

1967), affd, 36 A.D.2d 795, 320 N.Y.S.2d 1015 (2nd Dept 1971).

In the case at bar, with regard to both contracts at issue, plaintiff was notified, before the award of each contract, that each contract would not be awarded to the lowest bidder because the Mayor had determined that it was in the best interests of the City and pursuant to law, to award the contracts to a minority or women-owned business enterprise or qualified joint venture. According to plaintiff's complaint, § 3-09 of the Rules of the City of New York authorizing contract awards to M/WBEs was void and unenforceable because of § 103 of General Municipal Law. Rather than seek an injunction or mandamus to compel compliance with proper contract award procedures as it saw them, plaintiff waited until long after much of the work on both contracts had been completed and substantial payments made to the contractors. See, Seabury Construction Corp. v. DEP., 160 Misc. 2d. 87, 607 N.Y.S.2d 1017 (Sup. Ct. N.Y. Co. 1994). See also, Funderburg Bldrs. v. Abbeville City Memorial Hospital, 467 F. Supp 821, 825 (D.S.C. 1979); Sutter Brothers Construction Co., Inc v. City of Leavenworth, 238 Kan 85, 87-88, 708 P.2d 190, 191-192 (1985). Since an injunction is the only adequate means of protecting the public interest, the integrity of the bidding process, and the rights of the individual bidder after a contract has been let, plaintiff's course of litigative conduct in seeking damages for the alleged violation of his civil rights will defeat the public purpose of the bidding laws. Indeed, plaintiff seeks damages in the amount of the anticipated profits he expected if he had been awarded the contract.

Recognizing the adverse impact on the bidding

process that the lawsuit would have were it to succeed, the City moved to dismiss plaintiff's claims on the ground that they were barred by laches because 1) it had delayed filing suit for an unreasonable and inexcusable length of time from the time plaintiff knew of its claim against the defendant, and 2) the delay operated to the prejudice of the defendant. Bott v. Four Star Corp., 807 F. 2d 1567, 1576 (Fed. Cir. 1986).

In its motion for summary judgment, the City demonstrated that plaintiff had waited many months after the contracts had been awarded and the issuance of orders to commence work had been issued and the work required by the contracts had been virtually completed before plaintiff filed his lawsuit. The letters from the City's Chief Procurement Officer, Michael Rogers, clearly placed plaintiff on notice that it was not to be awarded the subject contracts, said rejections being the basis in the complaint at bar. The City demonstrated in its motion that if plaintiff succeeded in his lawsuit, not only would the City and the public suffer significant economic prejudice, but the precedent would be set whereby the public interest in the bidding process would be soundly defeated again and again.

(2)

The flexibility that laches provides a court in protecting the interests of both parties finds full expression in the case of Soules v. Kauaians for Nukolii Campaign Committee, 849 F. 2d 1176 (9th Cir. 1988), a matter the District Court properly viewed as "the prototype of a situation demonstrating that it would be unwise to adopt a blanket rule that laches can only apply in an equitable action." In Soules, plaintiffs sought an order invalidating a

special election and damages under § 1983 on equal protection grounds.

The Circuit Court, without reaching the merits, denied plaintiff's claim for equitable relief on the ground of laches. Id. at p. 1180. The Circuit Court stated that in order to create an appropriate incentive to bring challenges to state elections when the defects are most easily cured, the law imposes a duty on parties having grievances based on discriminatory practices to bring their complaints forward for preelection adjudication. Id. The Circuit Court stated that "[a]lthough adequate explanation for failure to seek preelection relief has been held to exist where, for example, the party challenging the election had no opportunity to seek relief (citation omitted), if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." Id.

Turning to plaintiff's equal protection claim, the Circuit Court held for "much the same reasons" that it would not entertain the claim for damages. Id. at p. 1182. The Circuit Court reasoned that to permit a section 1983 damage action under the circumstances "where claimants have bypassed their potential preelection remedies without adequate explanation" would provide a "perverse incentive" for losing candidates to ignore the principal routes established to challenge an election "and to proceed instead to have the election reviewed in federal court in hopes of gaining monetary compensation." The Circuit Court was well aware of its duty to ensure that elections conform with constitutional standards. However, it saw compelling countervailing concerns in excessive federal interference with disputes for which the states had provided procedures

to resolve. In "this spirit of restraint," the Circuit Court declined to countenance "Section 1983 gloss" on plaintiff's equal protection claim for damages.

The parallels between the case at bar and Soules are clear and demonstrate a clear conflict between the Second and Ninth circuits.[4] As we noted at the outset, the bidding laws are for the public benefit, not rejected bidders. An unaccepted bid is not a contract and it cannot sustain a cause of action for its breach. Plaintiff could have sought an injunction in federal court (Sims Varner & Associates v. Blanchard, 794 F. 2d 1123, 1125 [6th Cir. 1986]), or it could have made a challenge within four months in an Article 78 proceeding. See, DiBerardino's Inc. v. Rome Consol. School District, 134 Misc.2d 188, 510 N.Y.S.2d 435 (Sup. Ct. Oneida Co. 1986). In such a proceeding, plaintiff could have raised the constitutionality of the rules he challenges as unconstitutional: See, Christ the King Reg. High School v. Culvert, 815 F. 2d 219, 224-225 (2d Cir. 1987). Plaintiff ignored the routes established to challenge the legality of the award of a contract.

Two decisions dismissing untimely suits because of the laches of disappointed bidders illustrate the propriety of the principles articulated in Soules. In DRT v.Collin County Texas, 845 F. Supp. 1159, 1162 (U.S.E.D. Texas 1994), DRT sought damages under 42 U.S.C. § 1983 claiming that it had a property right as the low bidder in a construction contract and was deprived of that right when the contract was awarded to the second lowest bidder. In DRT, the County awarded the contract on June 22, 1992, but plaintiff

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[4] In its opinion, the Second Circuit found the holding in Soules to be "unpersuasive" (A16).

did not file his lawsuit until January 19, 1993, almost seven months later. Id. The District Court found that plaintiff's proper course of action would have been "to seek an injunction, rather than to allow the County to proceed with letting of the contract and construction to begin." Id. The District Court properly observed that it is against public policy to allow disappointed bidders to pursue suits for damages after having failed to attempt to prevent the contract from being awarded to another contractor.

> To allow a disappointed bidder to file suit for damages after construction has begun and is well underway is contrary to the public interest. Allowing a disappointed low bidder to recover damages from the County would penalize the taxpayers of the County, who the laws were designed to protect (citation omitted). The taxpayers would be required to pay the disappointed low bidder for its lost profits, and then also pay the company receiving the bid the amount of over payment. Id. at p. 1163.

In granting the County summary judgment, the District Court, after noting the seven month delay between contract award and the initiation of the lawsuit, stated that "by allowing the County to proceed with construction and incur the expenses of the construction process, the County's position was changed to its detriment." DRT, said the Court, was "guilty of laches with regard to any property right of DRT in the bidding process for failing to seek an injunction." Id.

Similarly, in Carlson T.V. v. City of Marble, 612 F.

Supp 669, 672 (D.C. Minn. 1985), the District Court dismissed an unsuccessful bidder's lawsuit for damages that was filed after almost a year and a half after the construction began, and a year after construction had been completed. The District Court highlighted the facts that plaintiff was available to commence its litigation at all times and had presented no reasons for the delay. On the other hand, "[t]he delay was prejudicial to the defendants because the bid award was finalized and the construction was undertaken." Id. at p. 673. By the time the action was filed, the bid procedure could not be undone. Id. Cf., City and Borough of Juneau v. Breck, 706 P. 2d 313 (Alaska 1985).

(3)

The Circuit Court's assertion that an express limitation period reflects a legislative value judgment striking the appropriate balance between interests promoted by a particular statute and countervailing interests of repose is correct as general statement of legal principle. However, the facts at bar represents a compelling example where the application of laches before the expiration of the statute of limitations period, though novel, will deter disappointed bidders from ignoring the principle routes established to challenge contract awards while promoting a uniformity of result that provides protection for municipal interests and honors the historic wisdom of the value of repose. Cf., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 262, 105 S.Ct. 1245, 1266 (Stevens dissenting in part). See also, Telink , Inc. v. U.S., 24 F. 3rd 42, 45-46 (9th Cir. 1994), citing, Alsop v. Riker, 155 U.S. 448, 460, 461, 15 S. Ct. 162, 166-167 (1894)..

The case at bar highlights the imperative and

necessity of granting municipalities repose after a suitable time after the award of contracts and the order to commence work has been issued. In New York, as in virtually any other municipality, claims of constitutional violations in the awarding of contracts can be brought to the attention of authorities by expedited procedures such as an application for a preliminary injunction or Article 78's or like procedures long before public funds are expended for performance of the contract. The salutary principle underlying expedited procedures is that if the disgruntled bidder is correct in its claim, then the contract can be awarded to the proper party and the public will not be required to pay twice for the same construction project. Under these circumstances, application of the laches defense ensures that prompt remedial action will be taken by the alleged disadvantaged party. The propriety of the application of the laches doctrine in an election such as Soules and ina bidding cases like the one at bar, is revealed by the fact that in those matters claimants were prohibited from proceeding to "federal court in hopes of gaining monetary compensation." because they had bypassed other remedies, without adequate explanation, that might grant them the relief to which they are entitled.

In particular, in the case at bar, to allow the decision to stand is to sanction and award plaintiff's unexplained delay where remedies were available to address its claims, while giving short shrift to the public fisc. From a wider perspective, to allow the Circuit Court's decision to stand is to sanction outdated distinctions between law and equity that find no consistency among the Circuits.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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